

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

THOMAS E. NORWOOD,)	
)	
Petitioner,)	
)	
v.)	Civil Action No. 02-13-SLR
)	
RICHARD KEARNEY, Warden,)	
STATE OF DELAWARE, M. JANE)	
BRADY, and JAMES W. ADKINS,)	
)	
Respondents.)	

Thomas E. Norwood, Sussex Correctional Institution, Georgetown,
Delaware. Petitioner, pro se.

Thomas E. Brown, Esquire, Delaware Department of Justice,
Wilmington, Delaware. Counsel for Respondents.

MEMORANDUM OPINION

Dated: August 12, 2002
Wilmington, Delaware

ROBINSON, Chief Judge

I. INTRODUCTION

Petitioner Thomas E. Norwood is a Delaware inmate in custody at the Sussex Correctional Institution in Georgetown, Delaware. Currently before the court is petitioner's application for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. (D.I. 2) Also pending in this matter is petitioner's motion for appointment of counsel. (D.I. 37) For the reasons that follow, the court concludes that petitioner has failed to exhaust state court remedies. Accordingly, the court will dismiss his petition without prejudice, and will deny his motion for appointment of counsel as moot.

II. BACKGROUND

On July 12, 2001, petitioner was arrested in Sussex County, Delaware, for multiple drug-related offenses, including trafficking in cocaine. The Delaware Superior Court ordered petitioner held on secured bond, which he was unable to post. On July 27, 2001, he filed in the Superior Court a petition for a writ of habeas corpus, alleging an unlawful search and arrest. The Superior Court denied the petition. Norwood v. State, C.A. No. 01M-07-022 (Del. Super. Ct. July 30, 2001). The Delaware Supreme Court affirmed. Norwood v. State, No. 371, 2001, 2001 WL 1329692 (Del. Oct. 23, 2001).

In December 2001, while incarcerated awaiting trial, petitioner filed in this court the current application for

federal habeas relief. (D.I. 2, 3, 4) While any specific claims for relief are difficult to discern, it appears that petitioner asks this court to order the state courts to fulfill their constitutional obligation to afford him due process of law.

(D.I. 2) He also complains of an unlawful search and arrest, as well as the denial of effective assistance of counsel, and asks the court to order his immediate release. (D.I. 2, 3, 4)

Petitioner's trial commenced in the Superior Court on March 13, 2002. On March 15, 2002, the jury found petitioner guilty of twenty counts of drug-related offenses. Petitioner immediately appealed, but the Delaware Supreme Court dismissed the appeal for lack of jurisdiction because petitioner had not yet been sentenced. Norwood v. State, No. 141, 2002, 2002 WL 487169 (Del. Mar. 28, 2002). After the Superior Court imposed sentence on May 2, 2002, petitioner again appealed. His direct appeal is pending before the Delaware Supreme Court. Norwood v. State, No. 274, 2002 (pending).¹

Respondents ask the court to dismiss petitioner's application for failure to exhaust state court remedies. (D.I. 23, ¶ 7.) For the following reasons, the court will grant respondents' request.

¹ On August 9, 2002, the clerk of the Delaware Supreme Court confirmed that petitioner's direct appeal is pending before that court.

III. DISCUSSION

Pursuant to the federal habeas statute:

An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that -

(A) the applicant has exhausted the remedies available in the courts of the State; or

(B) (i) there is an absence of available State corrective process; or (ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

28 U.S.C. § 2254(b)(1). Grounded on principles of comity, the requirement of exhaustion of state court remedies ensures that state courts have the initial opportunity to review federal constitutional challenges to state convictions and sentences.

Werts v. Vaughn, 228 F.3d 178, 192 (3d Cir. 2000), cert. denied, 532 U.S. 980 (2001).

To satisfy the exhaustion requirement, "state prisoners must give the state courts one full opportunity to resolve any constitutional issues by invoking one complete round of the State's established appellate review process." O'Sullivan v. Boerckel, 526 U.S. 838, 845 (1999). Although a state prisoner need not "invoke extraordinary remedies," he must fairly present each of his claims to the state courts. Id. at 844-45. A claim has not been fairly presented unless it was presented "at all levels of state court adjudication." Cristin v. Brennan, 281 F.3d 404, 410 (3d Cir. 2002). Generally, federal courts will

dismiss without prejudice claims that have not been fairly presented to the state courts, thereby allowing petitioners to exhaust their claims. Lines v. Larkins, 208 F.3d 153, 159-60 (3d Cir. 2000), cert. denied, 531 U.S. 1082 (2001).

Here, it is obvious that petitioner has not satisfied the exhaustion requirement - his direct appeal is still pending before the Delaware Supreme Court. See Sherwood v. Tomkins, 716 F.2d 632, 634 (9th Cir. 1983) (stating that when "an appeal of a state criminal conviction is pending, a would-be habeas corpus petitioner must await the outcome of his appeal before his state remedies are exhausted").

For these reasons, the court finds that petitioner has failed to exhaust state court remedies. Accordingly, his petition will be dismissed without prejudice.² His motion for appointment of counsel will be denied as moot.

IV. CERTIFICATE OF APPEALABILITY

Finally, the court must determine whether a certificate of appealability should issue. See Third Circuit Local Appellate

² The court declines to address respondents' argument that some of petitioner's claims may be moot because they appear to challenge the legality of his pretrial incarceration rather than his conviction and sentence. Although some claims could be construed as attacking petitioner's pretrial incarceration, it is plain that petitioner seeks to challenge much more than the legality of his pretrial incarceration. Rather than deciding any specific issues in a piecemeal fashion, the court will dismiss the petition in its entirety without prejudice for failure to exhaust.

Rule 22.2. The court may issue a certificate of appealability only if petitioner "has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2).

When a federal court dismisses a habeas petition on procedural grounds without reaching the underlying constitutional claims, the petitioner must demonstrate that jurists of reason would find it debatable: (1) whether the petition states a valid claim of the denial of a constitutional right; and (2) whether the court was correct in its procedural ruling. Slack v. McDaniel, 529 U.S. 473, 484 (2000). "Where a plain procedural bar is present and the district court is correct to invoke it to dispose of the case, a reasonable jurist could not conclude either that the district court erred in dismissing the petition or that the petitioner should be allowed to proceed further." Id.

As discussed above, the court has concluded that petitioner has failed to exhaust available state court remedies. The court is persuaded that reasonable jurists would not debate whether this procedural ruling is correct. Petitioner, therefore, has failed to make a substantial showing of the denial of a constitutional right, and a certificate of appealability is not warranted.

V. CONCLUSION

For the reasons stated, the court will dismiss petitioner's

application for a writ of habeas corpus without prejudice, and will deny as moot his motion for appointment of counsel. The court will not issue a certificate of appealability. An appropriate order shall issue.

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O R D E R

At Wilmington, this 12th day of August, 2002, consistent with the memorandum opinion issued this same day;

IT IS HEREBY ORDERED that:

1. Petitioner Thomas E. Norwood's petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 is dismissed without prejudice for failure to exhaust state court remedies.

2. Petitioner's motion for appointment of counsel (D.I. 37) is denied as moot.

3. The court declines to issue a certificate of appealability for failure to satisfy the standard set forth in 28 U.S.C. § 2253(c)(2).

Sue L. Robinson
United States District Judge